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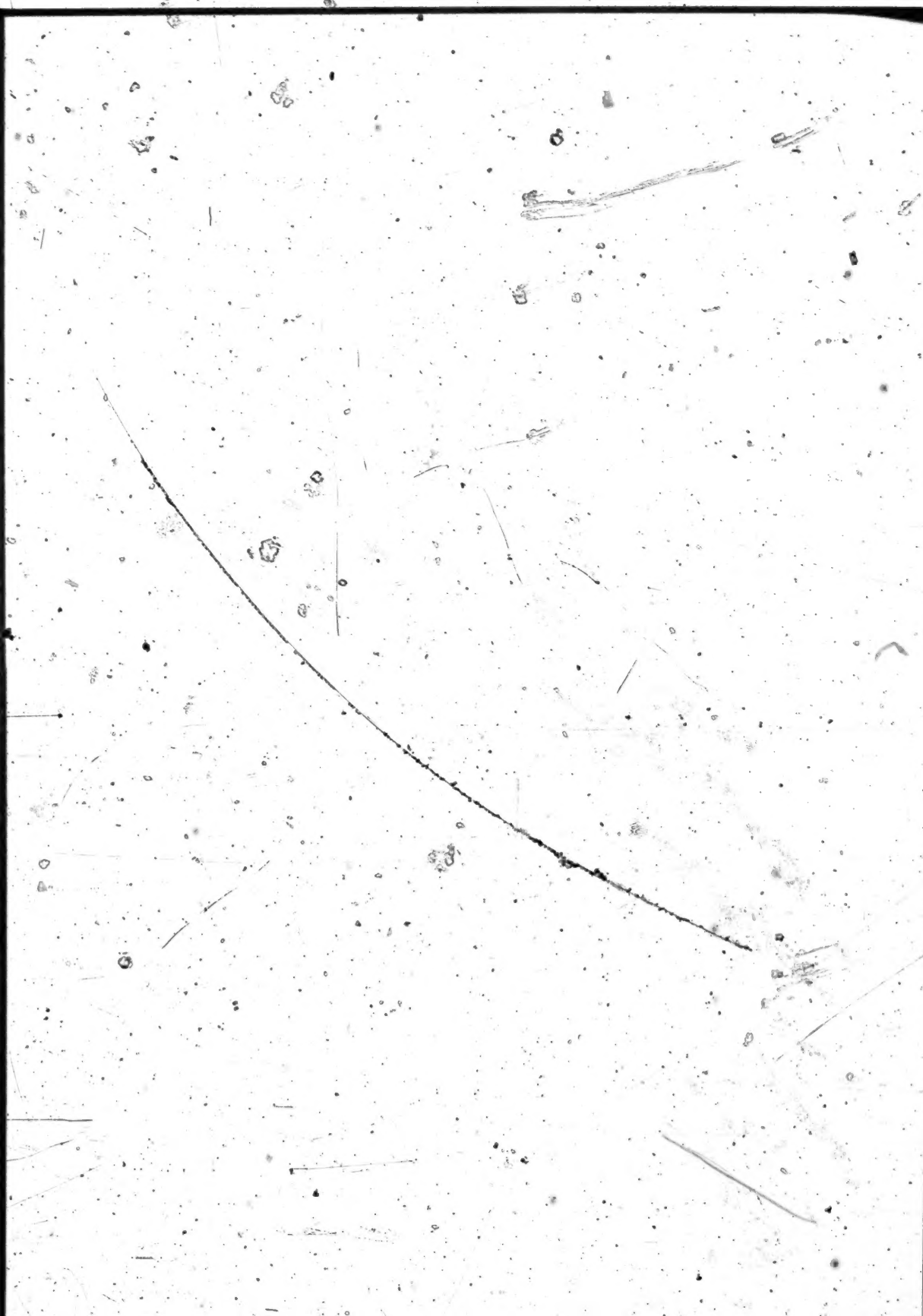

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 301

WEBSTER BIVENS, PETITIONER

v.

SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (App. 35–40) reaffirming its initial memorandum and order dismissing the complaint (App. 34) is reported at 276 F. Supp. 12. The opinion of the court of appeals (App. 44–59) is reported at 409 F. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1969 (App. 61). The petition for a writ of certiorari was filed on May 12, 1969, and granted

on June 22, 1970, 399 U.S. 905. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's allegation that federal officials violated his Fourth Amendment rights states a federal cause of action for damages.

STATEMENT

This is an action for money damages brought by petitioner, acting *pro se,* in the United States District Court for the Eastern District of New York against federal narcotics agents.[1] The district court granted the agents' motion to dismiss and the court of appeals affirmed. Petitioner's complaint and his affidavit filed in support of a motion for summary judgment contained the following allegations:

> Six federal narcotics agents, "acting under color of authority of the laws of the United States," forced their way into petitioner's apartment and arrested him "for violation of narcotic laws" (App. 1, 28). The agents then searched his apartment in an unreasonable manner (App. 2); the search and arrest were made "without cause, consent or warrant"

[1] The apparent contradiction in the title of this case—"Unknown Named"—arises from the fact that after petitioner filed his complaint, the United States Attorney supplied the clerk of the court with the agents' names. However, as the summonses and their returns indicate, only five agents are apparently involved (App. 5–24), rather than six as stated in the case title.

(App. 28). The agents "used unreasonable force" in effecting the arrest (App. 1–2), and, in particular, "manacled" petitioner in the presence of his family and threatened them with arrest (App. 2). Petitioner was then booked at the "Federal Narcotic Bureau, 90 Church St., New York City" (App. 2), presumably in connection with this arrest.

Petitioner claimed the arrest and search caused him "great humiliation, embarrassment, and mental suffering" and sought $15,000 in damage from each of the agents (App. 2).

Neither the complaint nor the affidavit set forth any details about the entry into the apartment and the arrest.

The district court granted the agents' motion to dismiss on the grounds that federal officials acting in the performance of their duty are immune from suits for damages, and that the complaint presented no federal question upon which relief could be granted under 28 U.S.C. 1331 (a) (App. 37–40).

The court of appeals, in affirming, held that the Fourth Amendment itself does not create a federal cause of action for damages arising out of an unreasonable search and seizure. The court reasoned that statutory authority is a prerequisite for such a federal remedy even though the wrong complained of is the violation of a constitutional right. While the court recognized that federal remedies have been implied from certain constitutional prohibitions, the controlling circumstances found to exist in those cases were

not present in the instant case because existing remedies for an unconstitutional search and seizure substantially vindicate the interests protected by the Fourth Amendment. (App. 52–58.) Thus, the court refused to depart from the traditional rule that the ways and means of enforcing constitutional rights should be left to Congress. (App. 59.)

SUMMARY OF ARGUMENT

I.

A. The Fourth Amendment had its genesis in the successful common law actions in trespass prosecuted in England against government officers who offered the defense of justification by reason of a general warrant. The English courts disallowed the defense by holding the warrants void. These cases indicate that the purpose of the Fourth Amendment was to insure that similar defenses would be disallowed in state common law actions. The fact that no general federal question jurisdiction was granted to the lower federal courts confirms that the Fourth Amendment was intended to affect only the defense in suits under state common law, not to create a wholly new federal tort action.

B. Implementing constitutional rights by adopting affirmative remedies for their breach has traditionally been considered a legislative function. The only cases that might be viewed as instances where the Court has performed that task are cases where no other remedy for vindicating the constitutional right was available.

The lack of any cases allowing a federal damage remedy under the Fourth Amendment is simply a manifestation of the general understanding of the Court's role in this regard and of the history and language of the Fourth Amendment, which indicate that state law governs the cause of action.

In the absence of implementing legislation, new remedies for enforcing constitutional rights should not be devised by the Court unless there is a compelling need for them. Decisions inferring rights of action from federal statutes require some showing of need as a prerequisite. When the Constitution is the only source for the new remedy, a significantly greater showing of necessity is required. Many different kinds of remedies for implementing the Constitution are available and choosing among them is a delicate task. Since the Court's range of choice is limited as compared with Congress', the decision to create a federal damage remedy should not be reached unless that remedy is essential for the protection of Fourth Amendment rights. The basis for judicial creation of the exclusionary rule under the Fourth Amendment serves as a guide in this respect.

C. Although state tort law may not effectively control police practices, a federal damage remedy would fare no better because the factors that render state law ineffective would apply equally to a federal remedy. The potential litigant's fear of antagonizing the police, together with unsympathetic juries, judgment proof defendants, and other factors, give the damage remedy little deterrent force. This is confirmed by experience

under 42 U.S.C. 1983, which allows civil suits against state officers for violating the Fourth Amendment. Although some of these difficulties might be cured by establishing minimum liquidated damages and allowing suits directly against the government, these are matters for Congress rather than the courts. When there has been a significant gap in state law Congress has filled it, as indicated by the enactment of 18 U.S.C. (Supp. V) 2520, allowing recovery of liquidated damages for illegal wiretapping or electronic eavesdropping even when accomplished by nontrespassory means.

Generally, state law adequately compensates the victim of an unlawful search or seizure for his injuries. Thus, had petitioner sued under New York law, the common law actions of trespass and false imprisonment would have provided him with an adequate basis for seeking relief.

Aside from actual physical injuries, the measure of damages for the deprivation of civil rights is uncertain and perhaps the only solution, aside from establishing minimum levels of recovery, is to give juries wide latitude in these matters. But this is essentially what state law does.

There is no void for this Court to fill by creating a federal damage remedy. Studies indicate that suits for damages are both an ineffective and unwise method of controlling the police. Since the remedy petitioner seeks does not solve the problem he perceives, it is not necessary as a matter of constitutional law for this Court to fashion a new cause of action in damages for violations of the Fourth Amendment.

D. Although the district court had jurisdiction over the claim that the Fourth Amendment gives rise to a federal cause of action in damages, it properly dismissed the complaint on the merits and was not obligated to pass on any claims under state law. Defenses raising federal issues may not be anticipated and pendent jurisdiction does not require consideration of state claims when the federal cause of action is dismissed before trial.

II.

Since the record in this case contains only petitioner's complaint, his affidavit accompanying his motion for summary judgment, and respondents' motion to dismiss, an informed judgment on the issue of official immunity cannot be made. Hence, if the Court determines that a federal cause of action has been stated, the case should be remanded to the district court for further development of the record.

ARGUMENT

The primary question in this case—and the only one we think it appropriate for this Court to decide (see point II below)—is whether federal law authorizes a suit for damages suffered as a result of a search and seizure by federal officers in violation of the Fourth Amendment. No federal statute permits such a suit. Petitioner contends, however, that such a right of action should be implied because (1) the framers of the Constitution so intended and (2) it is necessary in order to implement the Amendment since existing procedures and remedies are inadequate either to insure

its enforcement or to provide victims of its violation with adequate redress.

The first argument rests on a misreading of constitutional history. The second argument fails to take account of the extremely limited circumstances under which this Court has been willing to create a right of action for damages based on violations of constitutional rights where Congress has not seen fit to provide that method of enforcement. The Court has created such a right of action only in the unusual situation where, unless this were conferred, there would be no effective method of protecting the rights the particular constitutional provision provides. As we contend below, effective implementation of the Fourth Amendment's guarantee against unreasonable searches and seizures does not require the existence of a federal cause of action for damages.

I.

A FEDERAL RIGHT OF ACTION FOR DAMAGES FOR VIOLATION OF THE FOURTH AMENDMENT SHOULD NOT BE JUDICIALLY CREATED

A. THE FRAMERS OF THE CONSTITUTION DID NOT INTEND TO CREATE A FEDERAL DAMAGE ACTION FOR VIOLATION OF THE FOURTH AMENDMENT

If, as petitioner claims, the Fourth Amendment was indeed intended to create a federal damage remedy, this case would nearly be ended: there would be little, if anything, for the Court to "create." But this view ignores the historical background of the Amendment and the obvious purpose its framers intended it to serve.

In the latter half of the seventeenth century Chief Justice Hale wrote that in England a government officer could not defend a common-law action such as false imprisonment on the basis of authority under a general warrant.[2] Hale's proposition was put to a severe test when, in 1763, Lord Halifax issued, and had executed, a general warrant for the seizure of papers and persons connected with the publishing of the *North Briton, Number 45.* Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43 (1937). John Wilkes, the author of the pamphlet, along with others, quickly responded with suits in trespass against the officers who had carried out the searches and seizures. The officers defended on the basis of "special justification," that is, that the general warrants authorized their actions[3]—the same defense offered in the famous case of *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 [shorter version] (1765), a trespass action triggered by another of Lord Hali-

[2] I Hale, *History of the Pleas of the Crown* 580 (American ed. 1847); II *id.* 112 ("where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him, this was ruled a void warrant, *P. 24 Car. 1.* in the case of justice *Swallowe*, and was not a sufficient justification in false imprisonment").

Hale lived from 1603 to 1676. His *History of the Pleas of the Crown*, although ordered to be printed by the House of Commons in 1680, was not published until 1736. Holdsworth, *Some Makers of English Law*, 141 (1966 ed.).

[3] *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763); *Wilkes* v. *Wood*, Lofft, 1, 98 Eng. Rep. 489 (1763); *Money* v. *Leach*, 3 Burr. 1742, 97 Eng. Rep. 1075 (1765).

fax's general warrants issued six months before the *North Briton* affair.

In each case, the court rejected this defense by holding the general warrant void as contrary to law, and sustained substantial jury awards of damages against the offending officers.[4] These cases[5] not only led to widespread condemnation of general warrants, but also—and more important for present purposes—firmly established the principle that an unlawful warrant could not serve as a defense to a common law trespass action.

Against this background of English law, which remained vivid in the minds of the Framers,[6] it is not at all surprising that there is nothing in the Fourth Amendment to indicate that a new, *federal* cause of action for damages was being created. In America, as in England, government officers were to be subject to the same common-law actions for damages as those applicable to private persons. And the Fourth Amendment insured that when the Amendment's proscriptions

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[4] Wilkes recovered £1000; the awards to other plaintiffs ranged from £200 to £400. The defendants in *Huckle* v. *Money*, *supra*, claimed the verdict of £300 was excessive and moved for a new trial. But Chief Justice Pratt, later Lord Camden, although noting that £20 might have been sufficient, sustained the jury's award of exemplary damages on the basis that the "tyrannical and severe manner" in which the King's counsel and the Solicitor of the Treasury had insisted on the legality of the warrants justified the jury's response. 2 Wils. K.B. at 206–207, 95 Eng. Rep. at 769.

[5] Together with Colonial experience with the writs of assistance, see Lasson, *supra*, at 51–78.

[6] *Boyd* v. *United States*, 116 U.S. 616, 625.

had not been followed, the officers would be precluded from justifying an infringement made actionable by *state* common law.[7]

If the intention were otherwise—if a new federal action for damages were contemplated—it is difficult to understand why the lower federal courts were given no power over cases arising under the Constitution.[8] On the other hand, if the purpose of the Fourth Amendment was to foreclose the defense of justification in common law actions there was good reason for trying such cases in state courts. The right of action would be governed by state common law and although the Fourth Amendment would determine the federal officer's defense, it could be assumed that state courts would be alert to invalidate any unconstitutional exercise of federal power against the citizens of their state.[9]

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[7] This is confirmed by the very wording of the Fourth Amendment, which as Lasson, *supra*, at 100, n. 77, observes, "did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed."

[8] Congress did not confer general federal question jurisdiction until 1875. Act of March 3, 1875, § 1, 18 Stat. 470. See Frankfurter and Landis, *The Business of The Supreme Court* 65 (1928).

[9] Indeed the history of section 5 of the Act of March 3, 1863, 12 Stat. 756, which allowed federal officers to remove from state to federal court, suits "for any arrest or imprisonment made, or other trespasses" under color of federal law, indicates Congress' concern that the state courts might go too far. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 808–810 (1965).

It should be remembered that federal officers "must act within the states," *Tennessee* v. *Davis*, 100 U.S. 257, 263, that most of the colonial courts steadfastly refused to grant general writs even after England authorized them in the Colonies, Lasson, *supra*, at 72–73, and that state fears of federal power prompted adoption of the Bill of Rights after the Constitutional Convention had failed to provide one, Dumbauld, *The Bill of Rights* 4–50 (1957). In these circumstances the framers could hardly have intended by implication to create a situation in which federal officers would be held to account, in their dealings with citizens of a particular state while acting within that state, not by the traditional common law remedies that applied to state citizens and officers, but by a new cause of action governed by federal law and administered by federal, rather than state, courts.

Thus there can be no doubt that the framers of the Fourth Amendment did not intend it to be enforced by a federal damage action and that the plan envisaged when the Bill of Rights was passed was as Chief Justice Marshall described it nearly thirty years later:

> And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law * * * for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved * * * could be prosecuted only in the state court. * * * Congress has refused to the courts of the Union the power of deciding on the conduct of their officers, in the execution of

> their laws, in suits at common-law, until the case shall have passed through the state courts, and have received the form which may there be given it. * * *

Slocum v. *Mayberry*, 2 Wheat. 1, 10.

B. A FEDERAL DAMAGE REMEDY FOR VIOLATION OF CONSTITUTIONAL RIGHTS SHOULD NOT BE JUDICIALLY CREATED WITHOUT A SHOWING OF UTMOST NECESSITY THEREFOR

The specific issue presented by petitioner's claim with respect to the Fourth Amendment can best be approached by initially delineating what is not involved.

First, since it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, 28 U.S.C. 1442(a), see *Willingham* v. *Morgan*, 395 U.S. 402, a claim for relief, whether based on state common law or directly on the Fourth Amendment, will ultimately be heard in a federal court.

Second, as petitioner recognizes, the claim that existing remedies are inadequate is addressed mainly to cases where the exclusionary rule is inapplicable,[10] either because the search was fruitless or because prosecution was never contemplated.[11]

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[10] The remedy petitioner envisages, however, apparently would not be restricted to such cases.

[11] The fact that no prosecution results after a fruitful search does not mean that the exclusionary rule is not operating: the decision not to prosecute may be based on the belief that the evidence against the accused would be suppressed, thus leaving the government without a case.

Third, while it could be argued that a damage remedy fashioned under the Fourth Amendment would reach state as well as federal officers, this is of little moment because such a remedy against state officers already exists under 42 U.S.C. 1983. See *Monroe* v. *Pape,* 365 U.S. 167.

In this light we approach the precise issue in this case: whether this Court should create a federal damage remedy under the Fourth Amendment in the absence of any congressional enactment providing for such a cause of action.

1. This Court Ordinarily Has Not Enforced Constitutional Rights by Creating Causes of Action in the Absence of Implementing Legislation

(a). In nearly two centuries of constitutional adjudication the instances where this Court has sustained the awarding of damages against the federal government or its officers solely on the basis of a constitutional prohibition have been rare indeed. Petitioner points to *Wiley* v. *Sinkler,* 179 U.S. 58, and *Swafford* v. *Templeton,* 185 U.S. 487, but far from devising a new federal damage remedy for denial of the right to vote in a congressional election, those cases simply upheld federal jurisdiction without deciding the merits of the claim,[12] much as this Court did in *Bell* v. *Hood,* 327 U.S. 678, with respect to the Fourth Amendment.

Petitioner also cites *United States* v. *Lee,* 106 U.S. 196, but that case, which was an ejectment action against federal officers, has no bearing on the matter.

[12] See the court of appeals' analysis of these cases, App. 55–56.

As Mr. Justice Miller, the writer of the *Lee* opinion, explained just one year later, *Lee* was a common-law trespass action[13] where the trespassers "set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence." *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446, 452; see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696–698; 710, 716–718 (Frankfurter, J., dissenting); *Malone* v. *Bowdoin*, 369 U.S. 643, 647.[14]

The only case petitioner cites in which this Court permitted recovery of damages for violation of a constitutional right was a situation where such recovery was essential in order to make the constitutional protection meaningful. *Jacobs* v. *United States*, 290 U.S. 13, 16, held that under the Fifth Amendment a private

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[13] Of course, at the time of the *Lee* decision *Swift* v. *Tyson*, 16 Pet. 1, still held sway and there was thus no occasion for the Court to say whether this was state or federal common law. See Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1132, n. 105 (1969); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 798 (1957).

[14] The *amicus curiae* relies, as did the petitioner in the court of appeals (but not in this Court), on *West* v. *Cabell*, 153 U.S. 78. That case was a suit under the bond of a federal marshall. Section 783 of the Revised Statutes required a bond to be executed before a district judge, and Section 784 authorized suit in a federal court on the bond. The case therefore provides no support for the claim that where there is no statute authorizing federal suit for damages based on an alleged violation of the Fourth Amendment, such a right of action should be judicially created.

party had a right of action against the government for just compensation for the taking of his property.[15] The language of the Fifth Amendment—"nor shall private property be taken for public use, without just compensation"—created a duty to pay and that duty implied a right to recover. In addition to the very language of the Fifth Amendment, the Court's conclusion in *Jacobs* was compelled by the fact that a contrary result would have made the Fifth Amendment's prohibition a mere abstract pronouncement—the plaintiff had no other means of redress.[16]

There are dispositive differences between *Jacobs* and this case. Unlike the Fifth Amendment, there is nothing in the language of the Fourth Amendment that contemplates any payment of money. Moreover, the victim of an illegal search and seizure has a means of redress for any damages he may suffer: state common law provides a cause of action. Indeed, unlike the plaintiff in *Jacobs,* petitioner's argument is not that he has no other means of redressing the wrongs allegedly inflicted upon him, but rather that the other means are inadequate; and the alleged inadequacy is not primarily because he would receive insufficient compensation for his injuries, but mainly because the amount he would recover may not have a sufficient deterrent effect.

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[15] Substantial doubt has been expressed about the current validity of this aspect of *Jacobs.* See *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 876–881 (1957).

[16] The alternative of bringing a common-law action of ejectment, see *United States* v. *Lee, supra,* was not open because the taking in *Jacobs* was accomplished by the government's flooding plaintiff's land.

The cases permitting federal injunctions against state officers seeking to enforce unconstitutional state statutes (see *Ex parte Young,* 209 U.S. 123) similarly turn upon the necessity for such actions to insure vindication of the constitutional rights involved. We assume that, as presently viewed, such a right of action is derived from the Constitution.[17] As Professor Hart observed, however, such suits were originally sanctioned on the theory that "an individual could be enjoined from taking action which in the absence of official justification would amount to a trespass, and that the federal question of the existence of a valid justification could thus be determined as an incident of the suit to prevent trespass." Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 523–524 (1954), citing *In re Ayers,* 123 U.S. 443, 499–506. By "almost imperceptible steps," however, the injunction remedy took on a federal character. Hart, *supra* at 524. Doubtless this trend was occasioned by the difficult problems that arose when the action sought to be enjoined would not have amounted to a state common-law tort. Still, even in such a case, the constitutionality of the state law might have been determined as a defense in an enforcement suit by the state.

But this assumes the complaining party would—and should—be willing to violate state law in order to have the constitutional issue passed upon. The difficulty was that as a practical matter this assumption had no foundation in cases such as *Ex parte Young,* where the penalties for violating the

[17] But see note 18 *infra.*

state law were so severe that the railroads would have had to comply because they could not risk the possibility of losing in an enforcement action. See Wright, *Federal Courts* 185–186 (2d ed. 1970). Thus, if cases like *Ex parte Young* had been decided the other way there would have been no realistic way for the constitutionality of the state law to be challenged and the states would have been free to ignore the Constitution's proscriptions. See Wright, *supra*, at 185. As in *Jacobs* v. *United States*, *supra*, the judicially created federal remedy under the Constitution was essential to protect against infringement of secured rights.[18]

(b). The paucity of decisions sustaining federal damage claims for constitutional violations cannot be brushed aside by petitioner's explanation that such contentions were not raised because, under traditional pleading conventions, the complaint would reveal only the state-created right of action without mentioning the Fourth Amendment, which would be drawn in issue only by way of defense. The manner in which these cases were pleaded simply illustrates the general understanding that damage actions against law enforcement officials were brought under state law—an understanding that conforms to the language and his-

[18] The court of appeals also reasoned that in those cases injunctive power was an "essential corollary to the power of judicial review" and that "even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by government officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress" (App. 52–53).

tory of the Fourth Amendment. If litigants thought the Fourth Amendment created a federal damage remedy, or were sufficiently dissatisfied with state law to make such a claim, they would have had no trouble in stating it in their complaint and would not have relied upon state law. In any event, it is difficult to see how petitioner's explanation has any force, for even today the "plaintiff is not permitted to anticipate defenses in his complaint," Wright, *supra*, at 60.

2. A Federal Damage Remedy Should Not Be Judicially Created Under the Fourth Amendment Unless It Is Essential

In some respects the issue here is similar to that in *Wheeldin* v. *Wheeler*, 373 U.S. 647, an action for damages and an injunction against a federal officer for alleged abuse of the subpoena power granted by an Act of Congress.[19] In refusing to "imply" such a cause of action from the federal statute, the Court reminded that "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The instances where we have created federal common law are few and restricted." 373 U.S. at 651. "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. * * * Federal law, however, supplies the defense, if the

[19] Neither the majority opinion, 373 U.S. at 649, nor the dissent, *id.* at 655 n. 3, dealt with the question in terms of the Fourth Amendment.

conduct complained of was done pursuant to a federally imposed duty * * *, or immunity from suit." *Id.* at 652.

The description in *Wheeldin* of the law governing damage suits against federal officers is equally applicable to suits for false imprisonment and trespass where compliance with the Fourth Amendment supplies the defense although local law governs the cause of action. This of course was the scheme envisaged by the drafters of the Fourth Amendment [20] and is hardly unusual in our federal system. See, *e.g., Howard* v. *Lyons,* 360 U.S. 593, holding that the scope of the defense of privilege accorded federal officials for statements allegedly defamatory under state law is governed by federal law; and *Barr* v. *Matteo,* 360 U.S. 564, 575, holding that the right of action of a person complaining of abuse by a federal officer acting beyond the "outer perimeter" of his "line of duty" is controlled solely by "local law" except when such a right of action is conferred by a federal statute.

Of course, "actions against federal officials * * * are necessarily of federal concern." Mr. Justice Brennan dissenting in *Wheeldin,* 373 U.S. at 664. But Congress has manifested that concern not by subjecting federal officers to a law different from that obtaining in the states where they operate, but by allowing removal to federal courts of civil actions brought against them in state courts. See 28 U.S.C. 1442(a). If Congress had thought that federal officers should be subject to a law different than state law, it would have

[20] See pp. 9–13 *supra.*

had no difficulty in saying so, as it did with respect to state officers. See 42 U.S.C. 1983; *Monroe* v. *Pape*, 365 U.S. 167, 173–174.

There is an important distinction between *Wheeldin* and this case: here a constitutional provision rather than a federal statute is offered as the basis for creating the cause of action. But with respect to fashioning a new federal damage remedy, this distinction argues for greater restraint. Cases such as *United States* v. *Standard Oil Co.*, 332 U.S. 301, and *J. I. Case Co.* v. *Borak*, 377 U.S. 426, have indicated that a new cause of action for violation of a federal statute or implementation of a federal interest will be created where it is a "necessary supplement," 377 U.S. at 432, or "necessary or appropriate," 332 U.S. at 307.[21] In declining to create the latter type of action in *Standard Oil*, the Court stated that the fashioning of a new cause of action was for Congress, not the Court, 332 U.S. at 316–317.[22] But even though these are areas where Congress could act, the Court has not hesitated to create a remedy where the statutory scheme calls for it. Where the Court so acts, of course, Congress subsequently may approve, revise or reject what the Court has created.

When constitutional provisions are involved, however, the problem is quite different. At the least there would be substantial doubt whether Congress could

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[21] See *Wheeldin* v. *Wheeler*, 373 U.S. at 664 (dissenting opinion).

[22] This of course is also the effect of the decision in *Wheeldin* v. *Wheeler*, *supra*.

simply reject a judicially-created remedy bottomed on the Constitution;[23] a constitutional amendment might be needed for such an end. Moreover, the fact that such a remedy stems from the Constitution may give pause even if Congress considers only modification.[24]

Petitioner quotes Madison's statement that the courts will resist encroachments on constitutional rights, 1 Annals of Congress 439 (1789), and concludes the Court should act without considering the function Congress performs in this area. But as Justice Holmes admonished, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270. Of course, throughout the Nation's history this Court has performed the great function, through the exercise of judicial review, of shielding private persons against the constitutional excesses of other branches of government. But when it comes to the choice of what offensive methods should be employed to enforce constitutional rights, that is, when the Constitution is attempted to be used "as a sword instead of a shield," Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 521–522 (1954),

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[23] Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1, 41 n. 221 (1968).

[24] See Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1152–1153 (1969).

questions of a quite different order are raised. Compare *Wolf* v. *Colorado*, 338 U.S. 25, 28.[25]

Beyond the judicial horizon lie a whole range of devices for implementing the Constitution. See Hart & Wechsler, *The Federal Courts and the Federal System* 314 (1953). And the choice of one method, together with the permanence that inevitably attaches once the choice has been made, affects both the desirability and possibility of adopting other remedies which may be better suited to the task and perhaps less damaging to other values that also deserve protection. In sum, "All three branches of the government have responsibility for implementing the Constitution; the role of the judiciary in this regard is determined in part by the adequacy of measures and procedures instituted by the other two branches." Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 213 (1969).

Since some showing of need is a prerequisite for fashioning a right of action with respect to a federal statute,[26] a federal action for damages for violation

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[25] As the court below observed:

> The distinction between governmental and individual action drawn by the district court in *Bell* v. *Hood* has validity in the sense that the primary thrust of the Bill of Rights is to shield citizens from certain actions by the government. The implication of judicial remedies to provide this shield follows naturally from the declaration of a right; far less natural is the conversion of this shield into a sword directed against individual officers.

App. at 54–55.

[26] See Katz, *supra*, at 61–68.

of a constitutional right should not be judicially created unless this is vital to protect constitutional rights. The Court has required no less; as we have shown, causes of action under the Constitution in the absence of a statutory basis have been created only in the rare case where such a remedy was indispensable for vindicating constitutional rights.

Judicial experience with the Fourth Amendment itself supports this analysis. In *Weeks* v. *United States*, 232 U.S. 383, this Court held that evidence procured in violation of the Fourth Amendment should be suppressed in federal prosecutions. Yet the *Weeks* exclusionary rule—

> was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implementation.

Wolf v. *Colorado*, 338 U.S. 25, 28; 39–40 (Black, J., concurring). Twelve years after *Wolf*, this Court held that the "exclusionary rule is an essential part of both the Fourth and Fourteenth Amendment" and hence applicable to the states. *Mapp* v. *Ohio*, 367 U.S. 643, 657.[27] Without the exclusionary rule—the "most important constitutional privilege" under the

[27] Mr. Justice Black's explanation was that "[w]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Mapp* v. *Ohio*, *supra*, 367 U.S. at 662 (concurring opinion).

Fourth Amendment, *id.* at 656—the prohibition against unreasonable searches and seizures would be a mere "form of words," *id.* 655,[28] because of the "obvious futility of relegating the Fourth Amendment to the protection of other remedies," *id.* 652. The exclusionary rule of *Weeks,* as explained in *Wolf* and applied to the states in *Mapp,* was "the only effective remedy for the protection of rights under the Fourth Amendment." *Linkletter* v. *Walker,* 381 U.S. 618, 634. Thus, the extension of the exclusionary rule to the states, like the implication of private actions based upon the Constitution, rested on the need for such a remedy to protect the constitutional right involved.

C. A FEDERAL DAMAGE REMEDY UNDER THE FOURTH AMENDMENT IS NOT NECESSARY TO VINDICATE CONSTITUTIONAL RIGHTS

1. The Factors That Render State Tort Law Ineffective for Controlling Police Practices Would Also Apply to a Federal Damage Remedy

To establish the necessity for a federal damage remedy under the Fourth Amendment, petitioner relies heavily on *Mapp* v. *Ohio, supra.* However, the statements in *Mapp* about the inadequacy of existing remedies against state officers not only fail to support, but also substantially undercut, petitioner's claim that such a federal cause of action is essential.

Just four months before *Mapp,* the Court decided

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[28] Quoting Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392.

Monroe v. *Pape*, 365 U.S. 167, sustaining a damage action against state officers under 42 U.S.C. 1983 for violation of the Fourth Amendment. Thus, when the Court decided *Mapp* it was well aware of the availability of such suits against state officers and yet nevertheless concluded that the exclusionary rule was necessary because other remedies were inadequate. 367 U.S. at 652. Petitioner's contention that a 42 U.S.C. 1983-type remedy against federal officers is now needed because of the insufficiency of the exclusionary rule rests on the unwarranted assumption that such a remedy would be effective against federal officers; but it was in the light of the same type of remedy against state officers that the Court extended the exclusionary rule to the states.[28]

If damage suits for violations of the Fourth Amendment, such as those allowed under 42 U.S.C. 1983, were an effective means of controlling police practices, one would expect that state police would conform to the Fourth Amendment to a significantly greater extent than federal officers. But petitioner has offered nothing to show this and the situation may well be precisely the opposite. Compare Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 495 n. 17 (1955). In any event, the use of

[28] Petitioner's reliance on cases such as *Lankford* v. *Gelston*, 364 F.2d 197 (C.A. 4), to show that more civil remedies are needed against federal officers is misplaced. *Lankford* was a suit against state police who, apparently undeterred by the threat of damages under 42 U.S.C. 1983, had conducted more than 300 illegal searches.

42 U.S.C. 1983 to redress unlawful searches by state police apparently has been minimal.[30]

The reason is apparent. The difficulties with the damage remedy apply as much to suits under 42 U.S.C. 1983 as to suits under state law and relate not to the substantive law governing the action, but to other factors.[31] Thus,

> For one thing the average citizen is not willing to take the financial risk and trouble attendant upon litigation. Days may be lost from work, heavy expenses may be incurred in an unsuccessful suit and the recovery may be quite small. Offended citizens, especially those who are considered "police property," are often afraid of antagonizing the police for fear of retribution. Attorneys may discourage suits of this nature because they are unremunerative and because of a belief that the judges are prejudiced in

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[30] Thus, 42 U.S.C.A. 1983, notes 141, 297 and 340 (1970), list approximately 15 such cases, including *Monroe* v. *Pape*, *supra*; *Lankford* v. *Gelston*, *supra*; and the district court's opinion in this case, 276 F. Supp. 12 (E.D.N.Y.). See also Anno., 1 A.L.R. Fed. 519, 533 (1969). While there are undoubtedly a number of unreported cases and even other reported cases, still over so many years in a country this size the number of these cases can hardly be characterized as significant. See also note 31 *infra*.

The number of cases alleging what would be equivalent to the common law tort of false imprisonment is substantially higher. But, as will appear below, this is the area where state law allows the highest recoveries.

[31] See Note, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 Harv. Civ. Rts. & Civ. Lib. L. Rev. 104, 105 n. 15 (1970); Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L. Rev. 1015, 1034 n. 124 (1967).

> favor of police officers. With little to gain they see no point in antagonizing the police. * * *
> [Note, 100 U. Pa. L. Rev. 1182, 1209 (1952).]

Further, "'[i]n the action for civil recovery, the testimony of the plaintiff will almost certainly be required which, in turn, opens up the possibility of introducing evidence of the criminal conviction to impeach credibility." Paulsen, *Safeguards in the Law of Search and Seizure,* 52 Nw. L. Rev. 65, 72 (1957). The jury's lack of sympathy for such plaintiffs is reflected in the small recoveries. Moreover, as the court below pointed out, one of the basic problems "is the understandable reluctance of both judge and jury to penalize law enforcement officers for violations of our increasingly technical body of Fourth Amendment jurisprudence." (App. 58).[32] Finally, even if a substantial award were won, the defendant officer may not be financially responsible.[33]

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[32] Since the privilege of removing the case from state to federal court will be exercised in every instance, there can be no claim that a new federal cause of action is needed because federal judges and jurors would tend to award higher recoveries than their counterparts in state courts.

Aside from removal, even if a federal cause of action in damages were created there would be no guarantee that these cases would be heard in federal court so long as the $10,000 amount-in-controversy requirement remains, 28 U.S.C. 1331(a).

[33] See Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345, 346–353 (1936). In addition, federal law, and doubtless the law of some states, forbids garnishment of the officer's salary. See, *e.g.*, *Buchanan* v. *Alexander*, 4 How. 20; *Federal Housing Administration* v. *Burr*, *309 U.S.* 242, 244, 250–251; *McGrew* v. *McGrew*, 38 F.

These factors, which would obtain even if a federal damage remedy were created, have been outlined in Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955), an article much relied upon by petitioner. In criticizing state law, Professor Foote distinguished between suits for false arrest or imprisonment and suits for trespass. In the former, damages beyond those measured by actual physical injury are routinely allowed and substantial jury awards thus are not uncommon.[34] Professor Foote proposes to solve the perceived inadequacies in state tort law by allowing tort actions to be brought directly against the government rather than against the offending officer.[35] This would provide a financially responsible defendant and make ir-

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2d 541, 544 (C.A. D.C.), certiorari denied, 281 U.S. 739; *United States* v. *Krakover*, 377 F. 2d 104 (C.A. 10).

There are no federal statutes or regulations authorizing reimbursement of judgments against federal law enforcement officers in these kinds of cases; and we know of no informal practice of doing so. Even if an informal practice did evolve, it is doubtful that funds would be available to cover awards as high as those sought in this case. In such event, the officers' only recourse would seem to be to seek a private bill, as government employees found it necessary to do prior to the Federal Tort Claims Act, 28 U.S.C. 2671–2680. See *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 550 & n. 7.

[34] He concluded, however, that such suits do not operate as an effective deterrent because (1) police are usually judgment proof; and (2) the cases where the deterrent is most needed involve plaintiffs who "lack the minimum elements of respectability" necessary for high jury awards. Foote, *supra*, at 497–500.

[35] A recent study agrees, Mathes and Jones, *Toward A "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 Geo. L. J. 889, 907–908 (1965).

relevant the fact that an officer, although acting illegally, was following his superior's command, a fact usually admissible in mitigation of damages. Foote, *supra*, at 514–515. Professor Foote also proposes a minimum damage recovery in order to induce plaintiffs to sue and to allow recovery even when the plaintiff does not have "clean hands." *Id.* at 515.

The problems Professor Foote seeks to solve are present, for the most part, in suits under 42 U.S.C. 1983, as well as under state tort law and would exist even if a new federal cause of action against federal officers were judicially created under the Fourth Amendment.[36] If these factors render state tort law—and presumably also Section 1983—ineffective, a new federal damage remedy could be expected to fare no better—unless Professor Foote's proposals were found desirable and adopted. But imposing liability directly on the federal government rather than on its agents, and providing a minimum amount of recovery would require action by Congress after careful study.[37]

[36] As Professor Foote himself points out with regard to minimum liquidated damages, "This suggestion is applicable to both the tort and civil rights actions, and in the case of the latter liquidated damages are particularly appropriate because 'there are many rights and immunities * * * which are not capable of money evaluation.'" Foote, *supra*, at 515, quoting *Hague* v. *C.I.O.*, 307 U.S. 496, 518, 529, (opinion of Mr. Justice Stone).

[37] Thus, in regard to suits brought directly against state or federal law enforcement officials, the decision whether a minimum recovery should be adopted and, if so, when and how much, is difficult and requires the kind of study and exploration only Congress and state legislatures can undertake. See

When there has been a significant gap in state law Congress has filled it. Traditional common law actions were inadequate to deal with wiretapping or electronic eavesdropping accomplished by nontrespassary means, which this Court held to be within the scope

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Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 717–718 (1970). The problem is that in setting minimum damages high enough to induce injured parties to sue, the police may be overdeterred: "If an officer resolves all doubts in favor of his own pocket book, the public interest in effective law enforcement is sure to suffer." 3 Davis, *Administrative Law* § 26.03 at 522 (1958). And since the legality of a search or seizure may often be a close question, it would be unfair to penalize the officer when he makes a good faith mistake, even though the person against whom the search or seizure was directed has suffered no less an affront. Perhaps the only answer is to let the matter "go to a jury or a judge with considerable freedom to register a judgment which can take account of these various imponderables." Jaffe, *Judicial Control of Administrative Action* 251 (1965); accord Davis, *supra*, at 522; Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. L. Rev. 65, 73 (1957). Yet this is essentially how state common law operates and it may very well be that what has been perceived as a defect is in fact the only proper solution.

A good illustration of the need for flexibility is *Mason* v. *Wrightson*, 205 Md. 481, 109 A. 2d 128, which petitioner criticizes because only one cent was awarded in damages for a trespass by a police officer who conducted an illegal search. But the officer was acting pursuant to an order by his superior:

> Would an award of substantial damages have been desirable? Surely something would be wrong in a system in which a police sergeant would be personally penalized for conscientiously carrying out the orders of his superior. A policeman should not be required to get legal advice before following orders. * * *

Davis, *supra*, at 524–525.

of the Fourth Amendment. *Berger* v. *New York*, 388 U.S. 41; *Katz* v. *United States*, 389 U.S. 347, 353.[38] Accordingly, in 1968 Congress provided for a damage remedy against federal and state officers for the illegal interception of communications by wiretapping or electronic eavesdropping; liquidated damages of $100 a day, or $1,000, whichever is higher, as well as punitive damages, are authorized.[39]

2. A Judicially Created Federal Cause of Action in Damages Is Not Essential for Compensating Victims of Unlawful Searches and Seizures

We have shown that a judicially created federal damage remedy cannot be deemed essential for controlling federal law enforcement practices.[40] Petitioner also intimates, however, that such a remedy is necessary because state common law inadequately compensates the victim of an unlawful search or seizure. Consideration of this claim requires not only an evaluation of the law of New York, where petitioner could

[38] Prior cases had indicated this was not a Fourth Amendment violation. See *Olmstead* v. *United States*, 277 U.S. 438 (Constitution does not forbid wiretapping unless accomplished by actual unlawful entry into the house); *Goldman* v. *United States*, 316 U.S. 129 (electronic eavesdropping did not violate Fourth Amendment because there was no physical trespass); *On Lee* v. *United States*, 343 U.S. 747 (electronic recording of conversation did not violate Fourth Amendment because no trespass was committed); see also *Silverman* v. *United States*, 365 U.S. 505, 509.

[39] Omnibus Crime Control and Safe Streets Act of 1968, Section 802, 18 U.S.C. (Supp. V) 2520.

[40] Professor Foote evaluated the sufficiency of state law on the basis of how it fulfilled "its potential as a sanction to discourage police illegality." Foote, *supra*, at 501.

have sued, but also, and more important, the law generally prevailing in the states.

(a). In a very real sense, the person most harmed by an unlawful search and seizure is the person against whom incriminating evidence is thereby discovered—evidence that, if not suppressed, would lead to his conviction.[41] For such a person it is doubtful that monetary recovery, even of a substantial amount, would be sufficient vindication. But perhaps application of the exclusionary rule would be. As Professor Jaffe stated:

> Improperly seized evidence may be excluded, and thus fairly effective deterrence of police abuse is possible without the anomaly of awarding damages to a person for the embarrassment caused to him by the production of evidence relevant to his civil or criminal liability.

Jaffe, *Judicial Control of Administrative Action* 250 (1965).

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[41] See Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 47:

> But in terms of practical consequences the damage suffered [from an illegal search] is primarily to property interests and is not significantly different from the damage resulting from illegal entries by burglars or other criminals. And both the offense to privacy and the damage to property, if they are felt by the wronged person to be of sufficient magnitude to justify the time and expense involved, may become the foundation for a civil suit for damages against the offending officers.
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> It is only the person who has violated the criminal laws and who has the tools or other evidence of his criminal conduct secreted in his home or office or automobile who finds that an illegal search results in equal or greater consequences to his personal liberty than does an illegal arrest. * * *

This still leaves cases where an unlawful search or seizure is carried out against an innocent person. As to actual physical injuries, either to person or property, or monetary loss, state law generally provides compensatory relief. See Foote, *supra,* at 498; *Wolf* v. *Colorado,* 338 U.S. at 43 (Murphy, J., dissenting). Beyond this, in actions for false imprisonment, juries are allowed wide scope in "attaching a dollar value to immeasurables such as the sense of humiliation, distress, disgrace or outrage, or the usually fictional damages to reputation." Foote, *supra,* at 497; see also 1 Sedgwick, *Damages* 51 (9th ed. 1912). Also, if an unlawful search takes place in the owner's presence, recovery beyond nominal damages may be allowed for emotional suffering even if no physical harm to person or property takes place.[42]

The Federal Tort Claims Act, 28 U.S.C. 2671–2680, under which state law applies, 28 U.S.C. 2674, may provide an adequate remedy in many such cases. Although actions for false imprisonment and false arrest are excepted, 28 U.S.C. 2680(h), the United States

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[42] See 1 Haper and James, *The Law of Torts* 666 (1956):

> Recovery is allowed in many instances where the only substantial harm is emotional, by finding some traditional legal peg on which to hang it. Thus if the court can find a battery or trespass, however t[illegible], it is much less reluctant to uphold plaintiff's c[illegible]or mental suffering. The character of defendant's bel[illegible]or is also of prime importance. * * *

See also *Prosser, Law of Torts* 44, 67–68 (Hornbook Series, 3d ed. 1964); 47 Am. Jurs. 549 (1954) ("In estimating the damages recoverable [for a wrongful search], injury to a person's property, reputation, and feelings may be taken into consideration, as well as disturbance of his family").

may be liable for trespasses committed by federal officers. See 3 Davis, *Administrative Law* § 25.08 at 470 (1958); *Hatahley* v. *United States*, 351 U.S. 173, 181. And in a suit directly against the United States, judgment-proof officers, or juries prone to sympathize with the law enforcement officer's lot, see 28 U.S.C. 2402, would be no obstacle.[43]

Even if, for example, recovery for emotional distress is precluded because the owner was away at the time of the search, there is still the possibility of recovering exemplary damages.[44] To be sure, some states do not allow exemplary damages in the absence of actual damages. See 3 Frumer, *Personal Injury*, Sec. 2.02 (1965); *Oleck, Damages to Persons and Property* 560.8–.10 (1961). However, in the present context such cases appear more theoretical than real: it seems improbable that, in the absence of the owner's consent or presence, an entry for the purpose of conducting a search could be accomplished without causing some actual damage which would serve as a basis for awarding exemplary damages in those states where such a basis is required.

(b). Specifically, in New York, where petitioner could have sued, nominal damages are proper for an action in trespass if the plaintiff fails to demonstrate that he suffered actual monetary loss. See *Dixon* v. *Clow*, 24 Wend. 187 (N.Y.); *Town of Guilderland*

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[43] Perhaps such suits would have less of a deterrent effect than suits directly against the officers. But cf. *United States* v. *Gilman*, 347 U.S. 507.

[44] Recovery of punitive damages would be precluded, however, under the Federal Tort Claims Act, 28 U.S.C. 2674.

v. *Swanson,* 29 App. Div. 2d 717, 286 N.Y.S. 2d 425; *Holmes* v. *State,* 32 Misc. 2d 1077, 226 N.Y.S. 2d 626. Exemplary damages are also available if the plaintiff can demonstrate actual malice, which is defined as conduct that may be deemed tantamount to wanton and willful or reckless disregard for plaintiff's rights. See *MacKennan* v. *Jay Bern Realty Co.,* 30 App. Div. 2d 679, 291 N.Y.S. 2d 953. And the general rule of damages in New York allows exemplary damages even in those situations where the only actual damages are nominal. See *Cherno* v. *Bank of Babylon,* 54 Misc. 2d 277, 282 N.Y.S. 2d 114, affirmed, 29 App. Div. 2d 767, 288 N.Y.S. 2d 862; *Underwriters' Laboratories, Inc.* v. *Smith,* 41 Misc. 2d 756, 246 N.Y.S. 2d 436.

In addition, petitioner here claims that the actions of the respondent agents caused him "humiliation, embarrassment and mental anguish" (App. 2). It has long been held that damages for mental harms can be recovered incident to an action for trespass.[45] While we have discovered no decision from New York's highest court directly on point, in *Reed* v. *New York & R. Gas Co.,* 93 App. Div. 453, 87 N.Y.S. 810, the court held in a trespass action that damages should take into account "injury, insult, invasion of the privacy and interference with the comfort of the

[45] See note 42 *supra.* Illustrative cases are *American Security Co.* v. *Cook,* 49 Ga. App. 723, 176 S.E. 798; *Meagher* v. *Driscoll,* 99 Mass. 281; *Lesch* v. *Great Northern Ry. Co.,* 97 Minn. 503, 106 Nw. 955; *Bouillon* v. *Gas Light Co.,* 148 Mo. App. 462, 129 S.W. 401; *Harris* v. *Delaware, L. & W. R. Co.,* 77 N.J.L. 278, 72 Atl. 50.

plaintiff and his family," 93 App. Div. at 455, even though only nominal physical damages resulted and even though punitive damages were precluded. Since New York has been among the leaders in allowing recovery for emotional harm,[46] it would seem the courts of that state would follow the general rule and allow such recovery in this kind of trespass action.

Also, petitioner has clearly stated a cause of action for false imprisonment. *Tierney* v. *State of New York*, 266 App. Div. 434, 12 N.Y.S. 2d 877, affirmed, 292 N.Y. 523, 54 N.E. 2d 207. In New York the measure of damages in such cases is that amount that will fairly compensate the injured person, considering the mental suffering, indignity, humiliation, shame and disgrace he has suffered. See *Fields* v. *Victory Chain Store, Inc.*, 300 N.Y.S. 2d 688. In addition, here, as in the usual case of an unlawful search and arrest, petitioner may have a cause of action for battery. See *Frady* v. *State*, 19 App. Div. 2d 783, 242 N.Y.S. 2d 95; *Pawloski* v. *State*, 45 Misc. 2d 933, 258 N.Y.S. 2d 258.[47] Recovery for mental distress is also permitted in such actions. See *Williams* v. *Underhill*, 63 App. Div. 223, 71 N.Y.S. 291.

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[46] See, *e.g.*, *Ferrara* v. *Galluchio*, 5 N.Y. 2d 16, 161 N.Y.S. 2d 832, 152 N.E. 2d 249 (liability in negligence, where only resulting harm was mental distress); *Battalla* v. *State*, 10 N.Y. 2d 237, 219 N.Y.S. 2d 34, 176 N.E. 2d 729 (allowing recovery for physical and mental harm incurred by fright negligently induced).

[47] These are civil cases. New York has waived sovereign immunity for torts committed by state, as distinguished from local or municipal, officers; the injured party may therefore pursue his action directly against the state. Court of Claims Act § 8, 29A McKinney's N.Y. Jud.—Court Acts (Part 2) (1963).

Accordingly, had petitioner brought his action in a New York court on the theories of trespass, false imprisonment, battery, and mental distress, he would have had the benefit of a body of state law that permits substantial recovery. Indeed, in 1935 an award of $1,500 actual damages and $500 exemplary damages was upheld in a case quite similar to the instant one. *Saurel* v. *Sellick*, 244 App. Div. 845, 279 N.Y.S. 323 (the police, without warrants, searched plaintiff's premises, arrested him and held him in custody for five hours).

(c). Of course, the question whether state law generally, or New York law in particular, provides accurate compensation is unanswerable for, as Mr. Justice Stone pointed out, "[t]here are many rights and immunities * * * which are not capable of money valuation." *Hague* v. *C.I.O.*, 307 U.S. 496, 518, 529 (separate opinion). Moreover, in suits against officers, it may be that the amount of damages should vary directly with the degree of knowing violation of the Fourth Amendment, even though from the point of view of the plaintiff the injury remains constant. See *Pierson* v. *Ray*, 386 U.S. 547. In light of these considerations, perhaps the only solution short of establishing liquidated damages is to leave the matter to the jury, with considerable latitude to "register a judgment which can take account of these various imponderables." Jaffe, Judicial Control of Administrative Action 251 (1965); see *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763), discussed in note 4 *supra*. This essentially describes the practice under state law. See note 37 *supra*.

3. The Absence of Federal Legislation Providing for a Cause of Action in Damages Under the Fourth Amendment Against Federal Officers Has Not Left a Void That This Court Should Attempt to Fill

The creation of a federal damage remedy is hardly a novel idea. Recently a Presidential Commission studied a similar proposal and concluded:

> One much discussed method of controlling police practice is to impose financial liability upon the governmental unit as well as the police officer who exceeds his authority. A somewhat similar approach is provided for under the Federal Civil Rights Act.
>
> The effect of the threat of possible civil liability upon police policy is not very great. In the first place, plaintiffs are seldom able to sustain a successful lawsuit because of the expense and the fact that juries are not likely to have compassion for a guilty, even if abused, plaintiff. Insurance is also now available along with other protective methods that insulate the individual officer from financial loss.
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> * * * * *
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> In general, it seems apparent that civil litigation is an awkward method of stimulating proper law enforcement policy. At most, it can furnish relief for the victim of clearly improper practices. To hold the individual officer liable in damages as a way of achieving systematic reevaluation of police practices seems neither realistic nor desirable.

The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 31–32 (1967); see also Goldstein, *Ad-*

ministrative Problems in Controlling the Exercise of Police Authority, 58 J. Crim. L. C. & P. S. 160, 168 (1967); Paulsen, *Safeguards in the Law of Search and Seizure,* 52 Nw. L. Rev. 65, 73 (1957). In short, Congress' failure to provide the remedy petitioner seeks has not left a void that this Court should attempt to fill.

As to the present system, growth and improvement has always been the great tradition of the common law. When new situations are presented the state courts have the capacity for meeting them. If the tort law of some states is in need of improvement, there is no reason for supposing that the state courts are unable or unwilling to act.

In the absence of implementing legislation, judicial creation of a new, affirmative remedy to enforce a constitutional right should not be undertaken unless such a remedy is absolutely necessary. And when, as here, the remedy itself would be ineffective as a deterrent device, and suffer the same difficulties as comparable existing remedies, there is no necessity.[48] If the present system should be changed to provide additional remedies, the required study and choice among the numerous sanctions available is a matter for Congress in the absence of a demonstrable and

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[48] In an article much relied upon by petitioner, Professor Hill, after noting that the issue here is not "of great practical importance," does not urge that a federal damage remedy should be created under the Fourth Amendment and concedes that it is "at least arguable" that such a remedy is inappropriate. Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109, 1111, 1155 (1969).

compelling need for another remedy within traditional judicial competence.[49]

Every lower federal court that has considered this question agrees. *Johnston* v. *Earle*, 245 F.2d 793 (C.A. 9); *Koch* v. *Zuieback*, 194 F. Supp. 651, 656 (S.D. Cal.), affirmed, 316 F. 2d 1 (C.A. 9) (Fifth Amendment); *Garfield* v. *Palmieri*, 193 F. Supp. 582 (E.D.N.Y.), affirmed *per curiam*, 290 F. 2d 821 (C.A. 2) (Fifth Amendment), certiorari denied, 368 U.S. 827; *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Cal.); see also *United States* v. *Faneca*, 332 F. 2d 872, 875 (C.A. 5). Until Congress acts, as it did with respect to wiretapping and electronic eavesdropping, see 18 U.S.C. (Supp. V) 2520, any claim for damages suffered as a consequence of an allegedly unlawful

[49] As Professor Packer soundly observed:

> As compared with the Supreme Court, the legislature (by which I mean generically the Congress and the legislative bodies of the states) has far greater institutional competence to deal with the intricate problems of laying down rules for the governance of the police and sanctions for their breach. The legislature has fact-finding facilities that the courts do not have. A court is not a programmatic institution; its mission is to decide cases according to law. And in the area of criminal procedure, the only source of law for the courts to apply is the Constitution, whose spacious imperatives can hardly be mistaken for a detailed code of criminal procedure. Most significantly, the legislature is in a far better position to do two things that lie at or near the heart of the police problem: to adjust the extent of powers given to the magnitude of the interests protected by the criminal law; and to devise adequate sanctions for breach of whatever rules it chooses to lay down for the governance of the police.

The New York Review of Books, Sept. 8, 1966, p. 10, quoted in Friendly, *Benchmarks* 265 (1967).

search and seizure must be pursued under the law of the state where the acts occurred.[30]

D. ABSENT A FEDERAL CAUSE OF ACTION FOR DAMAGES, NO OTHER THEORY OF FEDERAL QUESTION JURISDICTION JUSTIFIED THE RETENTION OF THE CASE IN FEDERAL COURT

In light of *Bell* v. *Hood*, 327 U.S. 678, the district court had jurisdiction to decide whether the Fourth Amendment gives rise to a cause of action for damages. However, contrary to the contentions of the *amicus curiae*, once the court determined that damages were not available under the Fourth Amendment, it properly dismissed the complaint on the merits. No other theory of federal jurisdiction justified retention of the case in federal court.

The *amicus* argues that even absent the federal cause of action, the complaint properly alleges jurisdiction under 28 U.S.C. 1331(a). But, as *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, makes clear, federal jurisdiction would be lacking because a well-pleaded complaint for trespass and false arrest under state law would not contain on its face the necessary federal question. The constitutional issue concerning violation of the Fourth Amendment is not a proper part of the complaint, but would arise only if the agents attempted to justify the intrusion and arrest as in accordance with their duties as federal law enforce-

[30] Congress could, of course, amend the Federal Tort Claims Act, 28 U.S.C. 2680, to allow recovery for false imprisonment against the United States, thereby avoiding the problems caused by judgment-proof defendants and the reluctance of juries to impose liability on individual officers. State law would still control the cause of action. 28 U.S.C. 2674. Compare pp. 34–35 *supra*.

ment officials. However, the plaintiff cannot confer federal jurisdiction by anticipating issues that may be raised as defenses to the complaint. *Louisville & Nashville R.R.* v. *Mottley, supra.*

Nor may he do so by adding allegations that are not required to establish his cause of action: "For this requirement it is no substitute that the defendant is almost certain to raise a federal defense." *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656, 663; *Gully* v. *First National Bank,* 299 U.S. 109, 112–113.[51] The court was therefore not required to pass on any state claims that might have been within the scope of petitioner's complaint. The doctrine of pendent jurisdiction, see *Hurn* v. *Oursler,* 289 U.S. 238, does not call for a different result. As this Court stated in *Mine Workers* v. *Gibbs,* 383 U.S. 715, 726, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

II

THIS COURT SHOULD NOT DECIDE WHETHER RESPONDENTS ARE IMMUNE FROM SUIT BECAUSE THEIR ACTS WERE DONE IN THE PERFORMANCE OF THEIR OFFICIAL DUTIES

Both petitioner (Br. 16–24) and the *amicus* (Br. 13–17) urge that, if this Court holds petitioner has a cause of action for violation of his Fourth Amendment rights, it should then decide whether the respondents are immune from suit because of their

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[51] This principle also applies to assertion of the federal defense of official immunity.

claim that their acts were done in the performance of their official duties. Indeed, the *amicus* suggests that the Court should here reexamine and overrule *Barr* v. *Matteo*, 360 U.S. 564, its most recent decision dealing with the question of official immunity.

The court of appeals did not decide the question; neither should this Court. The only material pertinent to this issue in the record is petitioner's brief complaint (App. 1), his motion for summary judgment and supporting affidavit (App. 25–29) and the respondents' motion to dismiss (App. 31). These do not contain sufficient facts to permit an informed judgment on whether the respondents were acting within the scope of their duties. Compare *Pierson* v. *Ray*, 386 U.S. 547, 557. Before this Court should undertake to decide the issue—and certainly before it should consider reexamining *Barr* v. *Matteo*, *supra*—it should have a fuller record detailing all the significant facts relating to the issue.

Therefore, should this Court hold that petitioner's complaint does state a valid cause of action, it should remand the case to the district court to develop a fuller record on the official immunity issue.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970